CASE NO.:____19-3054_____

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

IN RE ROGER J. STONE, NYDIA STONE, ADRIA STONE, JEANNE ROUCO-CONESA and JOHN BERTRAN,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Original Proceeding from the United States District Court for the District of Columbia, Case No.: 1:19-CR-00018-ABJ

PETITION FOR WRIT OF MANDAMUS

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CERTIFICATE AS TO PARTIES

Pursuant to Circuit Rule 28(a)(1)(A), the following is a list of all parties, intervenors, and amici who have appeared before the district court:

1. Atkinson, Lawrence R. – Government counsel (terminated)
2. Buschel, Robert C. – Defense counsel
3. Campion, Tara A. – Defense counsel
4. Christenson, David – Intervenor (denied)
5. Christian Coalition for Judicial Reform – Amici Curiae (denied)
6. Corsi, Jerome – Amici Curiae/Interested Party (denied)
7. Farkas, L. Peter – Defense counsel
8. Goldstein, Andrew D. – Government counsel (terminated)
9. Jed, Adam C. – Government counsel
10. Kravis, Jonathan I. – Government counsel
11. Marando, Michael J. – Government counsel
12. Rhee, Jeannie Sclalfani – Government counsel (terminated)
13. Rogow, Bruce S. – Defense and Appellate counsel
14. Routman, Chandler P. – Defense counsel
15. Smith, Grant J. – Defense counsel
16. Zelinsky, Aaron J. – Government counsel

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

U.S. Constitution

RELIEF SOUGHT

Petitioner Roger Stone seeks relief from the United States District Court for the District of Columbia's February 21, 2019 Minute Order as amended by the July 16, 2019 Minute Order and the July 17, 2019 Order which prohibits him from: (1) "post[ing] or communicat[ing] on Instagram, Twitter, or Facebook in any way on any subject, including but not limited to forwarding, liking, re-posting, or re-tweeting anyone else's statements, articles, posts, or tweets." Appx. 227-228;[1] and (2) "making statements to the media or in public settings about the Special Counsel's investigation or any of the participants in the investigation or the case. The prohibition includes but is not limited to, statements made about the case through the following means: radio broadcasts; interviews on television, on the radio, with print reporters, or on internet based media; press releases or press conferences; blogs or letters to the editor; and posts on Facebook, Twitter, Instagram, or *any other form of social media*." Appx. 229-230.

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[1] Copies of the relevant orders and necessary parts of the record are provided in an Appendix, Volume 1 – Public, to this Petition (Appx. __). A second Appendix, labeled Volume 2 – SEALED, contains two relevant filings under seal below. Documents referenced in this Petition that are not relevant to the issues presented, but are necessary for context, are identified by their Docket Number (Dkt. __), but are not included in the Appendix.

The Co-Petitioner family members seek relief from the district court's July 17, 2019 Order prohibition that "*the defendant may not comment publically about the case indirectly by having statements made publically on his behalf by surrogates, family members, spokespersons, representatives or volunteers.*" Appx. 229-230 (emphasis by court).

The prohibitions on Roger Stone are a prior restraint of his First Amendment rights. The prohibitions on his family members constitute a chilling effect on the exercise of their First Amendment rights.

ISSUES PRESENTED

1. Does the district court's minute order of February 21, 2019, as "clarified" by the July 16, 2019 Minute Order and July 17, 2019 Order amending the conditions of release for Roger Stone, violate the First Amendment?

2. Does the district court's July 17, 2019 Order constitute an unconstitutional chilling effect on the First Amendment rights of Roger Stone's family members?

I.
THE PARTIES

Roger J. Stone, Jr., is the defendant in case number 19-CR-00018-ABJ, *United States v. Roger J. Stone, Jr.*, pending in the United States District Court, District of Columbia.

Nydia B. Stone, 71, is the wife of Roger Stone. She resides in Fort Lauderdale, Florida, with her husband. She uses social media platforms Facebook, Twitter and Instagram and has posted messages supportive of her husband and critical of his arrest, the case, and the investigation. Mrs. Stone stopped her social media postings after the July 16, 2019 Minute Order and July 17, 2019 Order because she fears her actions may cause Mr. Stone to be incarcerated.

Adria Stone, 53, the step-daughter of Roger Stone, also resides in Fort Lauderdale, Florida. Prior to the July 16, 2019 Minute Order and July 17, 2019 Order she used Facebook, Twitter and Instagram to support Roger Stone. She has curtailed her use of any platform for fear of running afoul of the court's Orders and having her actions negatively affect the conditions of release for Roger Stone.

Jeanne Rouco-Conesa, 53, is Nydia Stone's cousin. She resides in Coral Gables, Florida. She has used social media, Instagram and Twitter, to post support for Roger Stone and his endeavors. The Minute Order of July 16, 2019 and Order of July 17, 2019, have caused her to cease posting her support because she is afraid her actions will cause Stone to be incarcerated.

John Bertran, 61, is Nydia Stone's cousin. He resides in Melbourne, Florida, and uses Facebook to support Roger Stone. He has refrained from making supportive postings since the July 16, 2019 Minute Order and the July 17, 2019 Order. Mr. Bertran is fearful his supportive remarks will be attributed to Roger Stone and cause Stone to be incarcerated.

II.
MANDAMUS IS THE PROPER REMEDY

Mandamus under the All Writs Act, 28 U.S.C. §1651, is the proper remedy for reviewing a prior restraint on speech imposed by a district court's gag order. *See*, *In Re Murphy-Brown, LLC*, 907 F.3d 788 (4th Cir. 2018); *In Re Dan Farr Productions*, 874 F.3d 590, 597, n. 9 (9th Cir. 2017); *In Re Goode*, 821 F.3d 553 (5th Cir. 2016).

III.
STATEMENT OF THE CASE

A. The February 21, 2019 Minute Order

The Minute Order of February 21, 2019, stated:

> MINUTE ORDER as to ROGER J. STONE, JR. On February 19, 2019, the Court ordered the defendant to show cause at a hearing to be held on February 21, 2019 as to why the media communications order entered in this case [Dkt.] 36 and/or defendant's conditions of release [Dkt.] 21 should not be modified or revoked. A hearing was held on this date. For the reasons set forth on the record, and based upon the entire record, including the sealed exhibit to the hearing [Dkt.] 42 , the testimony of the defendant, the arguments of counsel, and the

> submissions of the parties [Dkt.] 28 [and Dkt.] 29 filed in connection with the potential imposition of a media communications order, the Court entered the following order at the hearing: the conditions of defendant's pretrial release [Dkt.] 21 are hereby modified to include the condition that, and the February 15, 2019 media communications order [Dkt.] 36 is hereby modified to provide that, the defendant is prohibited from making statements to the media or in public settings about the Special Counsel's investigation or this case or any of the participants in the investigation or the case. The prohibition includes, but is not limited to, statements made about the case through the following means: radio broadcasts; interviews on television, on the radio, with print reporters, or on internet based media; press releases or press conferences; blogs or letters to the editor; and posts on Facebook, Twitter, Instagram, or any other form of social media. Furthermore, the defendant may not comment publicly about the case indirectly by having statements made publicly on his behalf by surrogates, family members, spokespersons, representatives, or volunteers. The order to show cause is hereby vacated. Signed by Judge Amy Berman Jackson on 2/21/19. (DMK) (Entered: 02/21/2019).

Appx. 114-115.

B. <u>The July 16, 2019 Minute Order</u>

The Minute Order of July 16, 2019, stated:

> MINUTE ORDER as to ROGER J. STONE, JR. After receiving the government's motion for an order to show cause [136], the Court ordered that the defendant may file "any response to the government's motion and must show in writing...why the Court should not find that the defendant has violated the Court's order dated February 21, 2019 and his conditions of release." Minute Order dated June 21, 2019. Based on its consideration of the facts and arguments set forth in the motion [136], the

> defendant's response [141], and the evidence and arguments presented at the hearing held on this date, and for the reasons set forth on the record at the hearing, the Court concluded that the defendant has violated its orders. It deferred taking any action pursuant to 18 U.S.C § 401 and Federal Rule of Criminal Procedure 42 to issue an order to show cause and initiate proceedings to punish the defendant for any violation of the media communication order. However, the Court found it necessary to modify defendant's conditions of release to ensure his future compliance with those conditions. Therefore, it is ORDERED that the conditions of defendant's pretrial release [21], the February 15, 2019 media communications order [36], and the order of February 21, 2019 are hereby modified to add the following additional condition: during the pendency of this case, defendant may not post or communicate on Instagram, Twitter, or Facebook in any way on any subject, including but not limited to forwarding, liking, re-posting, or re-tweeting anyone else's statements, articles, posts, or tweets. All previous restrictions on statements made to the media, in public settings, and on other social media about the Special Counsel's investigation, this case, or any of the participants in the investigation or the case, remain in force as set forth in the Court's orders of February 15, 2019 [36] and February 21, 2019 and the conditions of release, and the defendant remains bound by all other conditions of release, including the prohibition on contacting witnesses. SO ORDERED. Signed by Judge Amy Berman Jackson on 7/16/19. Signed by Judge Amy Berman Jackson on 7/16/19. (DMK)

Appx. 227-228.

C. The Order of July 17, 2019

The July 17, 2019 Order stated:

> At the hearing held in this case on July 16, 2019, and in a minute order issued on the same date, the Court

> modified the February 15, 2019 media communications order [Dkt. # 36], the minute order dated February 21, 2019, and the defendant's conditions of release [Dkt. # 21] to include a ban on making any statement on any subject on Instagram, Twitter, or Facebook. Minute Order of Jul. 16, 2019.
>
> To ensure that there can be no misunderstanding, the Court hereby reiterates, as it stated on July 16, that all other conditions of release, and all other provisions of the Court's orders of February 15 and February 21, 2019, remain in force. This means, that *in addition to* the condition imposed yesterday:
>
> > [T]he defendant is prohibited from making statements to the media or in public settings about the Special Counsel's investigation or this case or any of the participants in the investigation or the case. The prohibition includes, but is not limited to, statements made about the case through the following means: radio broadcasts; interviews on television, on the radio, with print reporters, or on internet based media; press releases or press conferences; blogs or letters to the editor; and posts on Facebook, Twitter, Instagram, **or any other form of social media**.
> >
> > Furthermore, **the defendant may not comment publicly about the case indirectly by having statements made publicly on his behalf by surrogates, family members, spokespersons, representatives, or volunteers.**

Appx. 229-230 (emphasis by court).

D. Facts Leading to the July 16, 2019 Minute Order and July 17, 2019 Order

On January 24, 2019, Roger J. Stone, Jr., was indicted on one count of Obstruction of Proceedings, in violation of 18 U.S.C. §§ 1505 and 2, five counts of False Statements, in violation of 18 U.S.C. §§ 1001(a)(2) and 2, and one count of Witness Tampering, in violation of 18 U.S.C. § 1512(b)(1). Appx. 5-27. He was arrested by the Federal Bureau of Investigation during an early morning raid on January 25, 2019, in Fort Lauderdale, appeared before a magistrate judge in Fort Lauderdale, pled not guilty, and was immediately released on a personal recognizance bond. The case is scheduled for trial in the United States District Court for the District of Columbia (19-CR-00018-ABJ) on November 5, 2019, before the Honorable United States District Court Judge Amy Berman Jackson.

The case has received enormous publicity. The publicity began with Stone's dark-of-early morning arrest by numerous armed agents; an arrest covered live by CNN at 6:15 a.m., on January 25, 2019 and an arrest which, in addition to armored vehicles, was supported by a law enforcement boat posted behind Stone's Fort Lauderdale rented home. The publicity has continued, unabatedly (*see* footnote 3, *infra*), including most recently the reporting of remarks made by Special Counsel Robert Mueller about Stone to Congress on July 24, 2019; the coverage of the government's July 26, 2019 Motion seeking to introduce a clip from the movie "The Godfather 2" as trial evidence (Dkt. 156), and the district court's August 1, 2019

denial of various Stone pre-trial motions and the partial granting of unredacted portions of the Special Counsel Report of Robert Mueller. Dkt. 163, Dkt. 164.

The district court's recitation of the events which led to the July 16, 2019 Minute Order and July 17, 2019 Order (*see* pp. 14-20 *infra*), which are the subject of this Mandamus action is accurate, although its characterization of certain of its perceptions are disputed. But there is no dispute that the court's decision to restrict Stone's speech was prompted by the posting of a picture of the judge which, to the side, contained a symbol resembling a target. That prompted an immediate apology to the court (Appx. 55-57), but the court's confidence in Roger Stone was undermined.[2]

The court entered a Minute Order limiting Stone's comments about the case on February 21, 2019, reproduced in full on pages 5-6, *supra*. Appx. 114-115. Four months later, on June 20, 2019, the government filed a Motion for an Order to Show Cause why Stone should not be held in contempt of the February 21, 2019 Minute

[2] "Undermined" may be an understatement. When the court returned to the bench on July 16, 2019 to announce its decision regarding the postings which prompted the government's motion for an order to show cause, the court shared its thoughts about a series of transgressions of Stone (and lawyers "dissembling"), and that the February 21, 2019 Minute Order had not been appealed. The court stated that it would not hold Stone in contempt, but now would impose the bans it set forth in the July 16, 2019 Minute Order and July 17, 2019 Order. It is those Orders which prompt this Petition, expanding the February 21, 2019 Minute Order and now presenting the issue of whether any "gagging" of Mr. Stone, or his family, was founded upon any compelling government interest.

Order, attaching 8 examples of postings which the government alleged were violations of that Minute Order restricting Stone's speech as a condition of his release. Appx. 150-165.

On July 16, 2019, during a hearing set on Stone's Motion to Suppress Search Warrants (Dkt. 100), the court, *sua sponte*, raised the subject of the government's Show Cause Motion. Stone had responded to the Motion, arguing that the government's examples of "violations" of the February 21, 2019 Minute Order were not violations but were overreactions by the government. Appx. 168-178.

The court then engaged in an extended colloquy with Stone's counsel as to whether the postings offered by the government, and 3 other postings which the court had apparently viewed itself, were violative of the February 21, 2019 Minute Order. Appx. 188:20-210:5.

In response to Stone's counsel's defense of the Stone postings, the government suggested "clarification" of the February 21, 2019 Minute Order and a ban on social media use by Stone. The following colloquies between the government's counsel, the court, and Stone's counsel, set the stage for the Minute Order of July 16, 2019 and Order of July 17, 2019 which are the subject of this Petition:

THE COURT: Well, what seemed to be notably absent from your motion is a request. What would you like to see me do about it?

MR. KRAVIS [Government counsel]: I think that there are a couple of things that the Court can do to address the situation at this stage.

The very first, and I think the minimal one is, I think it is obvious from the filings that the Court needs to clarify, for the defendant and for defense counsel, what the February 21st order does and does not include. And in the government's view, the order clearly does include pictures that Mr. Stone takes of other people's words, that he publishes on his Instagram account. It includes comments that are phrased in the form of a question.

And it includes commentary about public filings. The February 21st order made no exception for public filings in the case, and it made no exception for public filings in the case for precisely this reason: Just because a party puts something in a public filing, that doesn't mean that the defendant's further dissemination of that information, or misinformation, or the dissemination of public commentary about that information or misinformation cannot prejudice -- cannot prejudice the jury.

***

It also appears to the government to be necessary, given the defendant's repeated violation of the order, for the Court at least to consider prohibiting the defendant from using his social media account at all.

I think the events from February 21st to today show that no matter how clear a line the Court draws, the defendant will cross it, and then will come to court and try to argue that he cannot be held responsible for it because there was some ambiguity when, in fact, there was no ambiguity.

> Those are the suggestions the government has at this point.
>
> THE COURT: Do you agree that if I wanted to fine him or sanction him for violating the media contact order, that that would require an order to show case and the invocation of all the procedures under Rule 42 for contempt?
>
> MR. KRAVIS: Yes. We're not asking for the Court to hold the defendant in contempt or to initiate either civil or criminal contempt proceedings at this point.
>
> What we are most concerned about is not punishing the defendant for his past transgressions. What we are most concerned about is protecting the integrity of the jury pool and protecting the fair trial right. And so what we are here asking for is a consideration of what we do going forward, not for punishment of the defendant's past conduct.
>
> ***
>
> MR. ROGOW [Defense counsel]: Four or five times, the government has talked about risk to a fair trial. That is -- that is an overblown, exaggerated claim that does not hold any water in this case and, in fact, in most cases tried in this country. A fair trial can be had. This communication by Mr. Stone is no risk to a fair trial.
>
> And I think that one has to think about the balance between the First Amendment issues that are here, when they're asking for consideration for him not to be using social media anymore, when they talk about the need to clarify the order. It underscores the danger of these kinds of orders when they're premised upon a false premise of danger to a fair trial.

Appx. 213:19-216:11.

E. The District Court's Recitation of the Reasons for its Orders

On February 15, 2019, the Court entered an Order pursuant to Local Criminal Rule 57.7(c):

> Counsel for the parties and the witnesses must refrain from making statements to the media or in pubic settings that pose a substantial likelihood of material prejudice to this case; and …
>
> all interested participants in the matter, including the parties, any potential witnesses, and counsel for the parties and the witnesses, must refrain, when they are entering or exiting the courthouse, or they are within the immediate vicinity of the courthouse, from making statements to the media or to the public that pose a substantial likelihood of material prejudice to this case or are intended to influence any juror, potential juror, judge, witness or court officer or interfere with the administration of justice.

Appx. 53-54. The Order imposed "no additional restrictions [] on the defendant's public statements or appearances" at that time. *Id.*

On July 16, 2019, the court recounted the history in a long statement which was a prelude to its ultimate entry of the July 16, 2019 Minute Order and July 17, 2019 Order. The court:

> Notwithstanding how fun it is to use colorful verbs, the Court did not slap or otherwise impose any gag order on Roger Stone at the outset of this case. At the status hearing on February 1st, 2019, I invited the parties to set out their positions concerning the imposition of a media contact order under Local Rule 57.7(c).

The defendant, in Docket 28 filed on February 8th, opposed any order as applied to him personally on grounds of vagueness, overbreadth, and the First Amendment. And he also emphasized how fundamental making public comments is to his identity and his livelihood.

There was no objection to a rule that would apply to the lawyers, and, obviously, there was an understanding that any such rule would apply to both sides. So I considered what he had to say. And in an order dated February 15th, 2019, at Docket 36, I found, first of all, that Local Rule 57.7(c) applies to this case, and I issued what I called a narrowly- tailored order. Counsel were ordered to refrain from statements to the media, but Mr. Stone was not.

With respect to Mr. Stone -- and I should note, not just Mr. Stone, but any other witness in the case -- the order prohibited public pronouncements at the courthouse, and at the courthouse only.

I said, "All interested participants in the matter, including the parties and any potential witnesses, and counsel for the parties and the witnesses, must refrain, when they are entering or exiting the courthouse, or they are within the immediate vicinity of the courthouse, from making statements to the media or to the public that pose a substantial likelihood of material prejudice to this case or are intended to influence any juror, potential juror, judge, or witness, or interfere with the administration of justice."

And I said, "There will be no additional restrictions imposed on the defendant's public statements or appearance at this time."

I did, however, add, "This order may be amended in the future, consistent with Local Criminal Rule 57.7(c), if necessary."

The order was not challenged on First Amendment grounds or any other. There was no request that I modify or review my order.

The defendant himself acknowledged the narrow nature of the ruling, stating publicly in an email that, I believe, he sent to politico.com, "I am pleased that the Judge's order leaves my First Amendment right to defend myself in public intact. I will, of course, continue to be judicious about my comments regarding the case."

But, as we heard the last time we were here, judicious didn't last three days. The license he was afforded was promptly abused as the defendant deliberately chose to use his public platform to disseminate an incendiary, threatening communication.

On December -- I'm sorry -- February 18th, Docket 38, counsel filed what was entitled a Notice of Apology. "Counsel hereby apologizes for the improper" -- his words -- "photograph and comment posted on Instagram today. Mr. Stone recognizes the impropriety" -- again, counsel 's words -- and he had it removed."

The filing attached a letter signed by Defendant Stone himself, which defendant later told me his lawyer just drafted for him; he didn't actually write it or read it. But it said, "Please inform the Court that the photograph and comment today was," quote, "improper and should not have been posted. I had no intention of disrespecting the Court and humbly apologize to the Court for the," quote, "transgression," close quote.

So, those are at least defense counsel's words.

I decided to have a hearing and issued an order to show cause on February 19th, and the hearing was held on February 21st. At that point, the defendant testified concerning the disturbing posts that had occurred soon after my order, and he had a chance to put it in his own

words because the defense team decided that he should testify under oath. The transcript is at Docket 43.

Mr. Stone said, at pages 11 to 12, "I believe I abused the order, for which I am heartfully sorry. I'm kicking myself over my own stupidity. I offer no excuse for it, no justification."

Page 12, he called it a "Stupid lapse of judgment," and he called it, "An egregious, stupid error."

Page 13, he called it "Bad judgment," "An egregious mistake."

These are all his words.

On page 14, he called it a "trespass." But he also said to me on page 14, "Your Honor, I can only beseech you to give me a second chance. Forgive me the trespass. I'm heartfully sorry. This is a sincere apology. I will treat the Court and all your orders scrupulously for the dignity and authority you deserve. I am -- I hope you'll consider my plea because it is sincere and heartfelt."

Well, then I had to wrestle with what to do. And the defendant did tell me, on pages 13 and 14 of the transcript, that no one was paying him to speak about the case and, therefore, there would be no impact on his ability to make a living if I prohibited him from speaking about the case.

So, then I solicited from defense counsel -- who, I believe, is also his First Amendment counsel -- his suggestion. And on page 41, I asked Mr. Rogow, "How would you craft an order that he would find clear enough to follow?"

And Mr. Rogow said, "It can be done. It can be done by refining what -- he should not be talking about this Court. He should not be talking about the special prosecutor. He should not be impugning the integrity of

the Court. That's what should be done. That's the nature of the order I'm suggesting.

"What I'm saying is, if Your Honor is asking me to craft an order, then that is what the order should say: This Court should not be criticized by Mr. Stone. The government should not be impugned by Mr. Stone. The integrity of this case should not be impugned by Mr. Stone. We will defend this case at trial. That's the time to defend this case. And that is the kind of nature of an order I would suggest the Court should craft that would address the specific needs that we're talking about."

And so that is almost exactly what I did. I didn't craft an order saying you can't impugn the Court or the prosecution. I said you can't talk about it at all. But I limited any prohibition to statements about the case and the participants after the specific suggestion of Mr. Stone's own counsel.

I issued an order on February 21st, 2019, and said, "The February 15, 2019 media communications order is hereby modified to provide that, the defendant is prohibited from making statements to the media or in public settings about the Special Counsel's investigation or this case or any of the participants in the investigation or the case."

That's what the defendant quoted as "the order" in his recent pleading. But it goes beyond that sentence.

I then said, "The prohibition includes but is not limited to, statements made about the case through the following means: Radio broadcasts, interviews on television, on the radio, with print reporters, or on internet-based media, press releases or press conferences, blogs or letters to the editor, and posts on Facebook, Twitter, Instagram, or any other form of social media.

"Furthermore, the defendant may not comment publicly about the case indirectly by having statements made publicly on his behalf by surrogates, family members, spokespersons, representatives, or volunteers." So that was the order that was issued that day.
And before I even put it in writing, I said the following to the defendant in court, to his face, in the presence of counsel, transcript page 50:

"From this moment on, the defendant may not speak publicly about the investigation or the case or any of the participants in the investigation or in the case."

Transcript 51: "You may send out as many emails, Tweets, posts as you choose that say, Please donate to the Roger Stone Defense Fund to help me defend myself against these charges, and you may add that you deny or are innocent of the charges, but that's the extent of it. You apparently need clear boundaries, so there they are.

"You may continue to publish, to write, and to speak, and to be, as your lawyer put it, a voice about any other matter of public interest; not this case, not the people in it. Not while you're under my supervision."

And I note, again, that subsequently, that order was not challenged on First Amendment or any other grounds.

The government has now filed a motion for an order to show cause saying that that order was violated. The defendant calls the government's submission "a disproportional response to Roger Stone's exercise of his first amendments rights within the confines of this Court's order."

But the question that is before us is whether it was within the confines of this Court's order. That's the question we have to answer. I think it's worth noting that the Court has repeatedly facilitated defendant's request to exercise his individual First Amendment rights.

> He has filed and I have granted repeated motions to travel, characterized as for business purposes. And I've let him travel wherever he wanted to go, to speak at whatever type of establishment he chose to patronize, to be accompanied by whatever organization he chose to associate himself with, and to advance whatever point of view he or they chose to sponsor or espouse at those locations.
>
> But, throughout the period, you've also been an individual who's subject to a court order imposed not only without objection, but with the concurrence and input of your First Amendment counsel, and no review or reconsideration has been sought.
>
> So the question I want to discuss -- and I would like to have whichever counsel is going to handle this matter come to the lectern -- is whether he's lived up to that obligation.

Appx. 181-188.

In addition to the 8 items raised by the government (*see*, Appx. 150-165), the Court then confronted defense counsel with 3 additional social media postings and took counsel through an explanation of each. Appx. 190:10-195:14. At the conclusion of the hearing, the Court imposed the July 16, 2019 Minute Order and July 17, 2019 Order, or gag orders, in which they, *inter alia*, prohibit Stone from any use of social media and prohibited, *inter alia*, family members, from making public statements on his behalf as "surrogates." *See*, p. 1, *supra*, "Relief Sought."

The complete ban on social media: "defendant may not post or communicate on Instagram, Twitter, or Facebook in any way on any subject" and "[t]he prohibition

includes, but is not limited to, statements made about the case," is the total silencing of Roger Stone and his family. It is based on no evidence, or suggestions of evidence, that there is any likelihood of material prejudice to this case, or any threat to the integrity of the jury pool or a fair trial. *All* the speech restraints placed on Stone and his family should be vacated.

IV.
WHY THE WRIT SHOULD ISSUE:
THE ORDERS VIOLATE THE FIRST AMENDMENT

The Order below, cloaked as a "condition of release," is a "gag order." A prior restraint on Roger Stone and on members of his family. "Like all 'court orders that actually forbid speech activities,' *Alexander v. United States*, 509 U.S. 544, 550, 113 S.Ct. 2766, 125 L.Ed.2d 441 (1993), gag orders are prior restraints." *In re Murphy-Brown, LLC*, 907 F.3d 788, 796-797 (4th Cir. 2018).

Such orders carry "a heavy presumption against [their] constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). In addition, the gag orders are content based – limiting the topics open for discussion and ideas or messages which can be expressed – creating another presumption of unconstitutionality. *Reed v. Town of Gilbert, Ariz.*, -- U.S. --, 135 S.Ct. 2218, 2231 (2015) ("[c]ontent-based restrictions on speech … can stand only if they survive strict scrutiny … 'which requires the government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.'" (quoting

Arizona Free Enterprise Club's Freedom Club PAC v. Bennett, 564 U.S. --, --, 131 S.Ct. 2806 (2011) (quoting *Citizens United v. Federal Election Com'n*, 558 U.S. 310, 340 (2010)).

The Orders below fail strict scrutiny. No compelling interest justifies prohibiting, *inter alia*, Roger Stone from "post[ing] or communicat[ing] on Instagram, Twitter, or Facebook in anyway on any subject. . . ." (July 16, 2019 Minute Order) or chilling the speech of his family members because Roger Stone's liberty might be compromised by their words. No compelling interest justifies preventing Stone from speaking about his case.

> Specifically, a gag order may issue only if there is a likelihood that "publicity, unchecked, would so distort the views of potential jurors that [enough] could not be found who would, under proper instructions, fulfill their sworn duty to render a just verdict exclusively on the evidence presented in open court." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 569, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976).

In re Murphy-Brown, LLC, 907 F.3d 788, 797-798 (2018).

Judge Wilkinson, in *Murphy-Brown*, set forth both the question, and the answer, to the gag order inquiry:

> The question, therefore, is neither whether a case has garnered public attention nor whether public discussion of it risks revealing potentially prejudicial information. Guidance is the critical concept. The question is whether the judge finds it likely that he or she will be unable to guide a jury to an impartial verdict. If judges can guide the jury to an impartial verdict, then no gag order may issue.

***

> By prohibiting only certain kinds of information from selected sources, a gag order can actually warp and distort discussion, thereby enhancing prejudice rather than mitigating it.

Id. at 798.

Stone's counsel posed the issue of "false premise" under which the conditions of release/gag order were founded:

> And I think that one has to think about the balance between the First Amendment issues that are here, when they're asking for consideration for him not to be using social media anymore, when they talk about the need to clarify the order. It underscores the danger of these kinds of orders when they're premised upon a false premise of danger to a fair trial.
>
> And, you know, over all the years that I've been involved in trying cases, I -- in small communities, where small newspapers repeatedly, every day, talk about a case, the cases find juries and the trials are fair. So this whole thing, the whole underlying premise, I think, is a false premise to begin with.

Appx. 216:6-17.

Judge Wilkinson's comments reinforce the fact that trials are not so easily compromised by publicity:

> Publicity often accompanies trials, including trials in which the public has a keen and understandable interest. The judicial process does not run and hide at the moments when public appraisal of its workings is most intense. . . . 'Prominence does not necessarily produce prejudice, and juror *impartiality* . . . does not require *ignorance*.' *Skilling v. United States*, 561 U.S. 358, 381 (2010).

> Jurors are not that fragile.

Murphy-Brown, 907 F.3d at 798 (emphasis in original).

The irony of the recent total speech ban on Stone and his family members is that he, and they, are forced "into a posture of passivity at a time when they have every right to be outspoken" (*id.* at 802), especially when Stone has been the subject of thousands of articles relating to his prosecution, including scores of articles in the Washington Post since his arrest in January 2019. Stone was mentioned 23 times during Special Counsel Robert Mueller's July 24, 2019 testimony, including when Mr. Mueller stated he "looked askance" at Stone. The scope of the Roger Stone commentary by the press and other commentators is so ubiquitous that it has even given rise to an oddsmaker's website measuring the odds of his being convicted.[3]

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[3] See PredictIt, available at: https://www.predictit.org/markets/detail/5213/Will-Roger-Stone-be-convicted-of-a-federal-charge-in-2019.

Since February 2019, the Washington Post, the dominant newspaper in the District of Columbia, has published 43 articles either directly about, or relating to, Roger Stone and his criminal case.

In addition, there have been tens of thousands of hostile-to-Stone articles authored by others about the "investigation" and Stone's "case;" articles, animated cartoons, comments, editorials, television and radio programs, panels, celebrity "dark comedy" readings of the Special Counsel's Report, and even a comedic portrayal of Roger Stone by Steve Martin on Saturday Night Live. *See*, Saturday Night Live: Tucker Carlson Cold Open (NBC television broadcast Jan. 26, 2019), available at https://www.youtube.com/watch?v=Sld27PfAF3M. See also, Late Night with Seth Myers: Steve Martin Has an Idea for a Roger Stone Joke for SNL, (NBC television broadcast Apr. 2, 2019), available at

The Fifth Circuit has held that gag orders are constitutional "only if the government can establish that 'the activity restrained poses either a clear and present danger or a serious and imminent threat to a protected competing interest.'" *In re Goode*, 821 F.3d 553, 559 (5th Cir. 2016) (internal citations omitted). The Stone and family order below, like the local rule in *Goode*, "acted as a complete bar on any speech related to the trial or the parties or issues in the trial. . . ." The court below, in its February 21, July 16 and July 17, 2019 Orders, made no attempt "to demonstrate how such an expansive rule is narrowly tailored." *Id*. at 561.

The Orders across the board prohibition that precludes Roger Stone from using all social media is a prior restraint "extraordinaire" which is subject to, and fails the strict scrutiny standards. *Compare, In re Dan Farr Productions*, 874 F.3d

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https://www.youtube.com/watch?v=_iABr16SOCM; NY Times June 26, 2019 "Celebrities Read the Muller Report and It's A Dark Comedy," available at: https://www.nytimes.com/2019/06/25/arts/television/mueller-report-live-reading.html; Family Guy: Trump Guy (Fox television broadcast Jan. 13, 2019, full episode viewed by over 4 million people), available at https://www.youtube.com/watch?v=6AVyqPW7jgg&app=desktop; Sonia Sariya, How Michael Sheen's Roland Blum Became The Good Fight's Wild Id, Vanity Fair (June 10, 2019), https://www.vanityfair.com/hollywood/2019/06/michael-sheen-the-good-fight-interview-roland-blum-emmys.

A compilation of over 10,000 news articles about the "investigations" and the "case" from January 26, 2019 through July 31, 2019, is available through LexisNexis Advance Research, via its "News" category, using the search terms: Mueller and "Roger Stone." A search of just "Roger Stone" yields over 12,600 documents alone.

590 (9th Cir. 2017), in which the district court said: "[N]ow I'm basically saying you post no documents about the issues in the case – no comment, no postings."

The Ninth Circuit wrote:

> The orders at issue are unconstitutional prior restraints on speech. They prohibit speech that poses neither a clear and present danger nor a serious and imminent threat to SDCC's interest in a fair trial. The well-established doctrines on jury selection and the court's inherent management powers provide an alternative, less restrictive, means of ensuring a fair trial.
>
> ***
>
> [T]here is no casual link between the numbers of social media participants and the district court's conclusion that Petitioners' speech will preclude the seating of an impartial jury. . . . Simply stated, there is no evidence connecting the scope of Petitioners' speech with the relevant jury pool.

Id. at 593-594 (footnote and citations omitted). The court continued:

> Prior restraints "are the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press*, 427 U.S. at 559, 96 S.Ct. 2791. The district court clearly erred in determining that Petitioners' speech presents a serious and imminent threat to a fair trial and that less restrictive alternatives to a prior restraint on speech were unavailable. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373-74, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976). Accordingly, we grant the petition for a writ of mandamus. The district court is directed to vacate its order of July 18, 2017, as modified on July 21, 2017 and August 24, 2017; and its order of September 25, 2017.

Id. at 596-597.

The district court here pointed to no evidence, no reason, no likelihood that "publicity, unchecked, would so distort the views of potential jurors that [enough] could not be found who would, under proper instructions, fulfill their sworn duty to render a just verdict exclusively on the evidence presented in open court." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 569 (1976). By making the speech prohibitions "conditions of his release," the court restrained speech with a confinement sword of Damocles hanging over Stone's head. That the Stone speech restraints bear no relation to conditions of release is apparent to the district court, who acknowledged her approval of Stone's travel and did not have any reason to question his faithful compliance with Pretrial Services.

By extending the threat to his liberty to quell the voices of his wife, his step-daughter, and his cousin, the district court also curtailed their speech, lest something they say be viewed as "surrogacy." Thus, family members could put Roger Stone at risk of his liberty should they voice an opinion as to his innocence, the arrest, the investigation, the case, or the witnesses who the government may offer. At the least, they and Stone would be subject to an inquiry by the court as to whether they were "surrogates." The family members' speech is chilled. The chilling effects on their speech presents an independent First Amendment claim. *Compare*, *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965), in which the Supreme Court struck a Louisiana law which was overbroad, finding that it had a "chilling effect upon the exercise of

first Amendment rights [which] may derive from the fact of the prosecution, unaffected by the prospects of its success or failure." So too here.

Nydia Stone, Adria Stone, Jeanne Rouco-Conesa and John Bertran wish to be heard, wish to independently communicate with others, in support of Roger Stone. They fear that the government, or the court, may claim that what they say is "directed" by Roger Stone, and any ensuing query about the circumstances of their First Amendment exercise could lead to Roger Stone's loss of liberty. The "chilling effect" is clear.

CONCLUSION

This Court should grant the Writ for Mandamus and direct the district court to vacate its February 21, 2019 Order, its July 16, 2019 Minute Order, and its July 17, 2019 Order. There should be no restraints on the speech of Roger Stone and his family. Nothing supports the notion that a fair and impartial jury in the District of Columbia will not be able to be selected in this case. The "fair trial" *ipse dixit* is not a sufficient basis to curtail First Amendment rights in this case.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 2, 2019, I electronically filed the foregoing with the Clerk of Court using CM/ECF. I also certify that the foregoing is being served this day on all counsel of record via email and on the trial Court, via Federal Express.

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